

died at Yule that year ; for it was urged, the tutor had but five weeks wherein to do diligence, and so could not be liable.

The Lords found him not accountable for the money-rent of that term, and far less the victual-rent, which uses not to be delivered till after Christmas.

The next point was, An alternative obligation in the said Andrew Lundy's case,—*viz.* to cause Fairny allow £1000 of the sums due to him by Fordell, or else to deduce it out of the first end of his own debt. This was ALLEGED to be conditional and penal, and which could not take effect till he had been required and interpellated : but the Lords found no necessity of any requisition.

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1695. *January 18.* ROBERT TAYLOR *against* CAMPBELL of GLENFALLOCH and the EARL of BROADALBINE.

ROBERT Taylor against Campbell of Glenfalloch and the Earl of Broadalbine, for a spuilvie and restitution of the damages. ALLEGED,—If it be pursued as a spuilvie, *pœna suos tantum debet tenere auctores* ; and the chieftains and heads of the clans cannot be liable. If it be insisted in as a depredation, then that is a crime, and must be first cognosced and tried in the justice-court. ANSWERED,—Damage and interest, arising from a criminal fact and delinquency, may be insisted in before the Lords, being only *ad civilem effectum* ; and here it would have no criminal effect, because the crime was pardoned by the king's indemnity, both *quoad vindictam publicam et privatam* ; and the 100th act 1587, and subsequent acts anent quieting the Highlands and Borders, and naming judges, are not privative of the session.

The Lords repelled the defence of competency, and sustained themselves judges.

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1695. *January 18.* ROBERT DOUGLAS of KIRKNESS *against* SIR WILLIAM BRUCE of KINROSS.

THE Lords found, Seeing Kirkness craved to be reponed against the transaction, conform to the clause in Sir William's back-bond, he must consign, not only the 3000 merks then paid to his tutors, but also the annualrents thereof since the term of the said back-bond ; but that Sir William must not only restore him to his right, but also to his possession he then had of St. Serfe's Inch : and that being proven, then Sir William behoved to hold count for the whole rent of the land since his entry, unless he would instruct that he had then, in his person, rights which were preferable to Kirkness, and would have excluded him ; but that he could not found on rights he had purchased since, to debar them.

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